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No. _____

Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,

Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST)

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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January 27, 1992

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court denies due process of law when it requires a defendant to submit to arbitration of claims against it by majority vote of a panel, when the panel majority has been appointed by the plaintiffs.

2. Whether a state court denies due process of law when it refuses to take any of several available actions before the arbitration begins to create an arbitration panel which is unbiased both in fact and in appearance.

3. Whether judicial review after an arbitration award under a standard which requires a showing of "evident partiality" or "corruption" for vacation is an adequate remedy to correct structural bias of an arbitration panel.

LIST OF PARTIES

Houston Lighting & Power Company

Petitioner

City of San Antonio, Texas, acting by and through
City Public Service Board of San Antonio
Central Power and Light Company
City of Austin, Texas[1]
Honorable Joseph B. Morris, Judge of the
101st Judicial District Court of
Dallas County, Texas[2]

Respondents

RULE 29.1 STATEMENT

Houston Lighting & Power Company ("HL&P") is a wholly owned subsidiary of Houston Industries, Inc., which is a publicly held company. Central Power and Light Company ("CPL") is a wholly owned subsidiary of Central and Southwest Corporation, which is a publicly held company.

[1] The City of Austin was not a party to the state district court proceedings but, at Austin's request, was named as a party in interest when HL&P sought review by mandamus in the Texas appellate courts.

[2] As presiding judge of the 101st Judicial District Court of Dallas County, Judge Morris made the rulings which are the subject of this Petition. Under Texas mandamus procedure, he was named as a formal respondent in the ensuing mandamus proceedings in the Texas appellate courts, but has no interest in the subject matter.

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IN THE

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OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,

Petitioner,

v.

CITY OF SAN ANTONIO AND CENTRAL POWER AND LIGHT COMPANY

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF DALLAS COUNTY, TEXAS 101ST JUDICIAL DISTRICT

Petitioner Houston Lighting & Power Company ("HL&P") respectfully prays that a writ of certiorari issue to review the orders of the District Court of Dallas County, Texas, 101st Judicial District, entered August 22, 1990 and April 22, 1991, which (a) deny HL&P's due process rights by requiring it to submit to arbitration of claims against it by the City of San Antonio ("San Antonio") and Central Power and Light Company ("CPL") before a panel controlled by the appointees of the claimants against HL&P, and (b) deny HL&P's request for actions which, if taken, would have enabled the arbitration proceeding to meet applicable due process requirements. The Texas appellate courts had discretion to review the district court's action by mandamus but have refused to do so.

OPINIONS BELOW

The order of the District Court of Dallas County requiring arbitration dated August 22, 1990 (Appendix A) and the order denying relief in aid of fair arbitration dated April 22, 1991 (Appendix B) are not reported. The order of the Texas Court of Appeals at Dallas denying leave to file mandamus dated April 25, 1991 (Appendix C) is not reported. The order of the Texas Supreme Court dated June 19, 1991 denying leave to file mandamus (Appendix D) is reported at 34 Tex. Sup. Ct. J. 668, and the order of the Texas Supreme Court dated October 30, 1991 denying rehearing (Appendix E) is reported at 35 Tex. Sup. Ct. J. 61.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 (3).

HL&P resisted the orders of the district court on the ground that they violated HL&P's rights under the Fourteenth Amendment to the United States Constitution, and repeated this challenge in the Texas appellate courts, thereby preserving for review the constitutional questions presented. The denial of mandamus review by the Texas appellate courts makes the district court's order the decree of the highest Texas court for purposes of this Petition. *See, e.g., Minneapolis, St.P. & S.S.M. Ry. Co. v. Rock*, 279 U.S. 410 (1929).

Should HL&P's efforts to obtain review by mandamus not toll the running of the 90-day deadline imposed by 28 U.S.C. § 2101(e) for the filing of petitions for writ of certiorari, then HL&P respectfully requests the Court to treat this Petition as a request for certiorari review of the Texas Supreme Court's orders denying mandamus relief. These orders have the same effect as the district court's order. A state appellate court's refusal to entertain an original proceeding filed in that court qualifies as a "final judgment or decree" reviewable by certiorari. *See, e.g., Michigan Central Ry. Co. v. Mix, Mo.*, 278 U.S. 492 (1929).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> [N]or shall any State deprive any person of ... property, without due process of law ....

Relevant portions of the Texas General Arbitration Act, Tex. Rev. Civ. Stat. Ann. art. 224 et. seq. (the "Texas Act"), and the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. (the "FAA"), are reprinted as Appendix G and H, respectively.

STATEMENT OF THE CASE

In 1973 four electric utilities in Texas agreed to construct and operate jointly a two-unit nuclear power plant known as the South Texas Project ("STP") and executed a Participation Agreement to govern this undertaking. The four Participants are the City of San Antonio, acting by and through the City Public Service Board of San Antonio ("San Antonio"), the City of Austin ("Austin"), Central Power and Light Company ("CPL") and Houston Lighting and Power Company ("HL&P").[3] Relevant excerpts from the Participation Agreement are reprinted as Appendix I.

The Participation Agreement created a Management Committee composed of a representative of each Participant, which met regularly and made decisions concerning STP on the basis of the vote of Participants having an ownership interest greater than 60%; thus decisions required approval of at least three Participants. HL&P was designated Project Manager to make reports and recommendations to the Management Committee.

Before construction, it was estimated by consultants that STP would cost approximately $1 billion and be completed by 1982.

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[3] The interests in STP are owned by the four Participants as co-tenants in the following percentages: San Antonio (28%), Austin (16%), CPL (25.2%), and HL&P (30.8%).

In common with other nuclear projects of this era, construction cost escalations and delays were experienced at STP, due in large part to regulatory changes after the accident at the Three Mile Island nuclear plant. STP is now fully completed and operating; Unit One began commercial operation in 1988 and Unit Two in 1989. The final construction cost was $5.4 billion.[4]

Austin sued HL&P, claiming that the alleged failure by HL&P to perform its duties as Project Manager had increased STP construction costs by hundreds of millions of dollars. HL&P later joined San Antonio and CPL as parties in Austin's action. San Antonio and CPL then asserted their own claims against HL&P for damages comparable to those asserted by Austin, and demanded arbitration of the following global issues:

> [t]he extent to which Houston Lighting & Power Company has breached its obligations to [San Antonio and CPL] under the Participation Agreement, and the laws and statutes of the State of Texas, and the amount of statutory, actual and punitive damages caused by any such breach . . . .

No arbitration demand was made as to Austin's claims, and the claims of San Antonio and CPL were severed into a separate cause. Austin's claims were tried in 1989, and a jury found that the cost of STP had not been increased by any failure of HL&P to perform its duties as Project Manager. Judgment was entered denying Austin's claims against HL&P.[5]

After the *Austin* verdict San Antonio and CPL renewed their arbitration demands, basing them on the provisions of Section 23 of the Participation Agreement.[6] They insisted that each STP

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[4] After credit for a $750 million settlement paid to the Participants by Brown & Root, Inc., the original architect, engineer and constructor.

[5] Austin's appeal from this judgment is now pending decision in the Texas Court of Appeals at Dallas.

[6] Section 23.1 of the Participation Agreement permits a call for arbitration "If a dispute (other than as to a decision made [by the Management Committee] under Section 9.4 hereof) between any of the Participants should arise under this Participation Agreement." (App. 20a).

Participant is entitled to appoint one arbitrator under Section 23.2 and that accordingly their claims were to be decided by a panel of three arbitrators, one being appointed by each of San Antonio, CPL and HL&P.[7] Alternatively, if Austin was found entitled to appoint one of the arbitrators, then San Antonio and CPL asserted that the panel would be composed of four arbitrators, one each appointed by San Antonio, CPL, Austin and HL&P, respectively, and a fifth elected by the four.

HL&P strongly contested these arbitration demands, contending that Section 23 of the Participation Agreement did not contemplate, much less require arbitration of claims of this type, and that in any event arbitration by a panel controlled by the claimants was unfair and violated HL&P's constitutional and statutory rights. HL&P asserted that arbitration provisions were placed in the Participation Agreement as a means of resolving deadlocks on the Management Committee when a 60% vote could not be achieved, and were not intended as a vehicle for overturning Management Committee decisions on the basis of hindsight.[8] Nor were the arbitration provisions intended to be misused as a device for reallocating the agreed division of STP costs through recovery of damages from one Participant by other Participants.[9]

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[7] Section 23.2 (App. 21a) provides in pertinent part: "Any Participant calling for arbitration shall . . . [name] one arbitrator. [E]ach additional Participant . . . may appoint one additional arbitrator. If necessary to make the total number of arbitrators an odd number, the arbitrators so appointed shall elect one additional arbitrator."

[8] Participation Agreement Section 9.4 (App. 20a) provides: "All decisions reached by the Management Committee on matters concerning the South Texas Project and properly before the Management Committee for decision pursuant to the terms of this Participation Agreement shall be binding upon all Participants."

[9] The Participants set no fixed price for STP nor any deadline for its completion, and agreed to construct STP jointly and to share any risks and benefits in accordance with their respective ownership shares. Participation Agreement Section 14.2 (App. 20a) provides: "Each Participant shall pay its share of construction costs in accordance with requests for funds submitted by the Project Manager."

All parties recognized that both the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"), and the Texas General Arbitration Act, Tex. Rev. Civ. Stat. Ann. article 224, et seq. (the "Texas Act"), are applicable. In proceedings before the trial court, HL&P asked that, if arbitration was required, the court restructure the panel in aid of fair arbitration (Appendix F). Article 235(G) of the Texas Act (App. 14a) provided the court plenary authority, in addition to its inherent equity powers, to grant such relief. HL&P asserted that requiring it to arbitrate before a panel whose majority had been appointed by claimants against HL&P violated its constitutional rights to due process under the Fourteenth Amendment to the Constitution, as well as its statutory rights under the FAA and the Texas Act.

HL&P pointed out that in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), this Court addressed "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." The Court answered this question by holding that in the FAA Congress intended to provide not merely for *any* arbitration but for an impartial one (*id.* at 147), concluding that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Id.* at 150. Decision of claims against HL&P by a panel majority appointed by the claimants cannot meet the *Commonwealth* standard.

The district court did permit the addition of an arbitrator named by Austin, another claimant against HL&P (App. 2a). This addition did not elevate fairness above minimum levels, but exacerbated the problem. At that point there would be an even-numbered four-arbitrator panel, and the Participation Agreement requires election of a fifth member by the four. The addition of a fifth arbitrator would do nothing to prevent Austin, CPL and San Antonio from reallocating their respective costs in STP under the guise of a "damage" award by their appointed arbitrators.

Faced with this real and apparent unfairness in the composition of the panel, San Antonio, CPL and Austin attempted to repair it by having their appointed arbitrators sign a form of "neutrality oath" (Appendix L) similar to those required of neutral arbitrators by rules of the American Arbitration Association (Appendix K). These rules, however, are traditionally applied in "tripartite" arbitrations, in which each of the disputing parties appoints a panel member, and the inherent bias of party-appointed arbitrators is overcome by the deciding vote of the third neutral member. Appointees who know they were chosen by a party to a dispute cannot be considered "neutrals" in arbitration practice. See *infra* pp. 12-13.

Further, the arbitrators appointed by San Antonio and CPL are both ratepayers of the San Antonio electric utility and have a material financial interest in the outcome of the arbitration (Appendix M). As such they are disqualified under the doctrine of *Tumey v. Ohio*, 273 U.S. 510 (1927) from acting as judges in their own case. As the *Tumey* opinion states,

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.

Id. at 532.[10]

Oaths by judges and jurors do not in and of themselves overcome issues of bias and disqualification; these elementary requirements for judicial proceedings are made applicable to judicial enforcement of arbitration agreements by *Common-*

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[10] Apart from pecuniary interest, San Antonio ratepayers share a community interest in achieving recompense for asserted misdeeds by HL&P which allegedly resulted in hundreds of millions of dollars in unnecessary costs. The arbitrators appointed by San Antonio and CPL can reasonably be expected to consider who appointed them in reaching their decisions, and to be influenced to adopt partisan positions. See *Tumey*, 273 U.S. 532-35.

wealth. Thus the "neutrality oaths" cannot cover up the basic unfairness of an arbitration panel.

The trial court nonetheless rejected HL&P's pleas, and ordered arbitration before a five-member panel composed of the respective appointees of San Antonio, CPL, Austin and HL&P, and a fifth to be elected by the four party-appointees (App. 2a). The court refused to restructure this panel in any way to aid arbitration and to thus satisfy the requirements of due process (App. 4a). Possible corrective steps included recognizing that there are two "sides" to the dispute, and equalizing the number of appointees by each side; directing arbitration of the separate disputes with HL&P by San Antonio and CPL by different tripartite panels; requiring new appointments from a panel of true neutrals using a procedure which prevents the designees from knowing who selected them; and other available remedies.[11]

Under Texas law, a trial court order staying litigation and directing arbitration is not appealable. *Citizens Nat'l Bank v. Callaway*, 597 S.W.2d 465, 466 (Tex. Civ. App. — Beaumont 1980, writ ref'd). However, Texas precedent recognizes that such an order is reviewable by mandamus under an abuse of discretion standard.[12] Hence HL&P sought leave to file mandamus in the Texas Court of Appeals, which was denied one day after it was filed (App. 6a). Leave to file mandamus was then sought in the Texas Supreme Court, and denied on June 19, 1991 (App. 7a). HL&P then sought rehearing, which was denied by the Texas

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[11] Remedies to ensure fair arbitration, such as those available but rejected here, have been utilized by other courts in comparable situations. See *infra* pp. 14-15.

[12] The Texas courts have recognized and exercised this authority repeatedly in arbitration cases. *Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Longoria*, 783 S.W.2d 229 (Tex. App. — Corpus Christi 1989, orig. mand. proceeding); *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W.2d 934 (Tex. App. — San Antonio 1989, orig. mand. proceeding); *USX Corp. v. West*, 759 S.W.2d 764 (Tex. App. — Houston [1st Dist.] 1988, orig. mand. proceeding); *see also Mewbourne Oil Co. v. Blackburn*, 793 S.W.2d 735 (Tex. App. — Amarillo 1990, orig. mand. proceeding) (reviewing questions presented through mandamus, but denying relief).

Supreme Court on October 30, 1991 (App. 8a). In each instance the denial of mandamus was without opinion.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Issues of National Significance

A. National Policy Favoring Arbitration Requires Fair Proceedings

Since deciding the so-called *Trilogy* labor arbitration cases in 1960,[13] this Court has supported a national policy favoring resolution of disputes by arbitration. In a series of decisions spanning three decades,[14] the Court has consistently supported Congressional policy, as expressed in the FAA, of enforcing agreements to arbitrate contractual disputes. The Court has thereby enhanced the viability of arbitration as an alternative to litigation, so that by 1985 Justice Blackmun could state with confidence: "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

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[13] *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960). The Court there held that doubts about enforcement of labor arbitration agreements must be resolved in *favor* of arbitration, departing from earlier decisions, such as *Wilko v. Swan*, 346 U.S. 427 (1953), where the Court found arbitration to be an inadequate substitute for litigation.

[14] *E.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) (limiting issues courts can examine when enforcing arbitration agreements); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) (FAA puts arbitration agreements "upon the same footing as other contracts"); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (FAA does not permit court to delay enforcement of arbitration agreement pending outcome of related state court proceeding); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*).

Given the ever-increasing number of disputes courts are asked to decide,[15] "a national policy encouraging courts to enforce arbitration agreements remains critical. But that policy makes sense *only* if judicially-enforced arbitration will lead to resolution of disputes in accordance with fundamental principles of due process. Litigants cannot have confidence in arbitration proceedings that do not meet minimal standards of impartiality; nor can the outcome of such proceedings be respected.

B. Judicial Enforcement of Unfair Arbitration Violates Due Process

This Court's decisions in recent years have focused on issues of arbitrability. The issues in this case present a different aspect of arbitration; i.e., whether due process requires a fair panel before arbitration can be judicially ordered. It has been twenty-four years since this Court held in *Commonwealth Coatings v. Continental Casualty Co.*, 393 U.S. 145 (1968), that due process standards applicable to judicial proceedings are not suspended when arbitration is used as a substitute for litigation. Indeed, the Court in *Commonwealth* rejected the argument that fairness was somehow less important in arbitration proceedings than in litigation, stating: "we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review." *Id.* at 149.

The requirement that arbitration proceedings be impartial both in fact and in appearance has both statutory and constitutional underpinnings. The FAA reflects Congressional intent to provide "not merely for *any* arbitration but for an impartial one." *Com-*

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[15] *See, eg.*, Nat'l Law Journal, January 13, 1992, at 5, col.1 (reporting on increased caseloads and delays described in Chief Justice Rhenquist's "1991 Year-End Report of the Supreme Court and the Federal Judiciary").

monwealth at 147. In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976), the Court affirmed this principle:

> Congress has put its blessing on private dispute settlement arrangements . . . but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity.

The constitutional basis for the holding in *Commonwealth* is found in the basic principles laid down in *Tumey v. Ohio*, 273 U.S. 510 (1927), which held that due process requires any tribunal deciding cases to be free of the appearance of partiality or financial interest. *Commonwealth's* application of these standards to arbitration panels remains critical today because of the increased use of binding arbitration as a surrogate for litigation.

The constitutional holding in *Commonwealth* has been widely followed. The New Jersey Supreme Court has held that "[t]he parties may agree to any form of dispute resolution that they wish, but they may not seek the backing of the courts for private actions that, while substituting for the judicial function, are fraught with the appearance of bias." *Barcon Assocs. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 222 (N.J. 1981). The Michigan Supreme Court agreed that in arbitration as well as judicial contexts "[a] basic requirement of due process is a 'fair trial in a fair tribunal.' [citations omitted] Essential to this notion is a fair and impartial decisionmaker." *Morris v. Metriyakool*, 344 N.W.2d 736, 738 (Mich. 1984).

The actions of the Texas courts, which compel HL&P to arbitrate damage claims against it before an unfair panel controlled three-to-one by arbitrators chosen by its opponents, do not meet these statutory or constitutional standards. This Court's correction of those actions, including reaffirmation of the principles of *Commonwealth Coatings*, would not only result in compliance with due process requirements, but also facilitate and expedite arbitration proceedings by requiring that courts ensure at the outset that arbitral panels comport with due process stan-

dards. Through this means arbitration can and will be accepted as a fair and meaningful alternative to litigation.

C. Multi-Party Disputes Particularly Require Actions to Ensure Due Process

Contractual disputes arising under multi-party contracts cannot always be resolved fairly when each party appoints an arbitrator. Depending on the nature of the controversy, a panel which is unfair both in fact and in appearance can result from literal application of such a formula. The present case provides an example of such unfairness: the claimants against HL&P have appointed three arbitrators to HL&P's one. Even the selection of an additional neutral arbitrator would not correct the imbalance.[16]

The problem stems from the inherent bias of party appointees. Courts have long recognized "that the party-designated arbitrators are not and cannot be 'neutral' at least in the sense that the third arbitrator [in a tripartite panel] or a judge is." *Astoria Medical Group v. Health Ins. Plan*, 182 N.E.2d 85, 87 (N.Y. 1962). In fact, party-appointees "are expected by the disputants and should be understood by the courts to act as *partisans only one step removed from the controversy*," *Finkelstein v. Smith*, 326 So.2d 39, 40 (Fla. Dist. Ct. App. 1976) (emphasis added). They are "effectively, and *by design*, representatives of the respective parties," *Richco Structures v. Parkside Village, Inc.*, 263 N.W.2d 204, 210 (Wis. 1978) (emphasis added), who are expected to be "*advocates*" for each respective position, *Anderson v. Nichols*, 359 S.E.2d 117, 123 (W.Va. 1987) (emphasis added).

The arbitration rules of the American Arbitration Association ("AAA") recognize the practical realities of party appointment. Rules 12 and 19 of the AAA *Commercial Arbitration Rules* provide that party-appointed arbitrators are not disqualified because of bias (App. 26a). The ABA *Code of Ethics for Arbitra-*

[16] The additional fifth arbitrator could not be neutral unless selected unanimously by the four party appointees. The order of the district court does not impose this requirement of unanimity.

tors in Commercial Disputes (Appendix J) specifically recognizes that party-appointed arbitrators "may be predisposed toward the party who appointed them" and that their obligation to reach an "independent, just and deliberate" award may properly be tempered by this predisposition. (Canon VII A, E, App. 23a, 25a). Further, the disclosure and *ex parte* communications principles generally applicable to arbitrators are relaxed for party-appointees (Canon VII B, C, App. 23a-25a). While serving as arbitrators, such individuals are not barred from the sort of financial, business, professional, social or family relationships that are likely to affect impartiality (Canon VII A(2), App. 23a). In the typical "tripartite" arbitration, this predisposition by two party-appointed arbitrators is balanced by the neutral third arbitrator who casts the deciding vote.[17]

But this practical protection disappears when there are more than two parties to the arbitration who appoint arbitrators, and a neutral no longer controls the decision. The New York Court of Appeals addressed such a case in *Di Stasio v. Avallone*, 234 N.E.2d 255 (N.Y. 1967),[18] adopting the view that an arbitration by a panel composed of two arbitrators appointed by parties on one side of a dispute and a third by the opposing party "will be a mere sham and its determination a foregone conclusion." 277 N.Y.S.2d at 575. Common sense supports this conclusion; an arbitration before such a panel would not achieve the "elementary requirements of impartiality" or avoid the "appearance of bias" as mandated by *Commonwealth*.

---

[17] The "Introductory Note" to Canon VII (App. 22a-23a) dealing with *tripartite* arbitration panels, explains the balancing process: "In such arbitrations, the two party-appointed arbitrators should be considered non-neutrals unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral." In both of these panels the presence of the third, neutral arbitrator assures an impartial decision, even if the party-appointed arbitrators disregard their promise to be impartial, because the neutral holds the controlling vote.

[18] The Court of Appeals adopted the dissenting opinion of Justice Steuer in the Appellate Division reported at 277 N.Y.S.2d 573 (App. Div. 1967).

The result here — three to one arbitration — is as much of a sham proceeding as in *Di Stasio*. Arbitration before such a panel does not comport with due process as required by *Commonwealth*.

D. Available Remedies In Aid of Fair Arbitration Should Be Employed by Courts Before Arbitration Begins

What, then, should a court do when asked to order arbitration before such an unbalanced panel? The answer lies in restructuring the panel, rather than in denying arbitration or sending the parties to arbitrate before a panel that fails to meet required standards. This is the action approved by the New York Court of Appeals in *Di Stasio*. The language of the arbitration clause was there interpreted to provide for the appointment of one arbitrator by each of the two *sides* of a dispute, with a third neutral selected by the two party-appointees. Thus the two defendants appointed one arbitrator, as did the plaintiff. Through this means the balance achieved by a "tripartite" panel was accomplished.

Judge Medina accomplished fairness by a different means, in *Compania Espanola de Petroleos, S.A. v. Nereus Shipping*, 527 F.2d 966 (2d Cir. 1975). Each of the three parties was permitted to appoint an arbitrator to a five-member panel, and the three party-appointees unanimously added two additional arbitrators. The court stated, "we are convinced that the method we have chosen is the only method that will give each of the parties fair and equitable treatment." *Id.* at 975.

Ample precedent further supports judicial intervention to correct an unfair panel *before* an arbitration occurs. *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972) (arbitrator named in agreement replaced because he was a partner in the law firm representing party); *Cristina Blouse Corp. v. Int'l Ladies Garment Workers' Union*, 492 F.Supp. 508 (S.D.N.Y. 1980) (arbitrator named in agreement replaced because he had formerly represented the union); *Rabinowitz v. Olewski*, 473 N.Y.S.2d 232 (N.Y. App. Div. 1984) (Jewish trade organization named as arbitrator in agreement replaced because a

letter accusing party of PLO ties and crimes committed in Israel had circulated among the membership); *Elmarina, Inc. v. Comexas*, N.V., 679 F.Supp. 388 (S.D.N.Y. 1988) (following *Nereus, supra*); *Matter of Czarnikow-Rionda Co.*, 512 F.Supp. 1308 (S.D.N.Y. 1981) (following *Nereus, supra*). *See also Third Nat'l Bank v. Wedge Group, Inc.*, 749 F.Supp. 851, 855 (M.D. Tenn. 1990) ("Where the potential bias of a named arbitrator makes arbitration proceedings a prelude to later judicial proceedings challenging the arbitration award, a court can appoint a neutral substitute arbitrator").

The need for judicial action in the present case was triggered not only by the unfair imbalance of the panel, but also by the pecuniary interest of the two San Antonio ratepayers appointed by San Antonio and CPL. See the discussion at *supra* p. 7. Disqualification and replacement of these appointees by the court is required under *Tumey v. Ohio*, *supra*. The court could, of course, adopt a method of replacement which preserves the parties' contract right to designate an arbitrator, provided other steps are taken (such as those described above) to ensure that one or more neutrals who are not party-appointees control the decision.

II. Limited Review Under a Strict Standard After an Arbitration Award is not an Adequate Remedy to Correct an Unfair Arbitration Panel Which is Biased in Fact and Appearance

The Texas Act sets out two standards for review of an arbitral award for bias. The award will be vacated if an arbitrator "appointed as a *neutral*" displays "evident partiality." Art. 237(A)(2) (emphasis added) (App. 15a). A narrower standard applies for a party-appointed arbitrator: his actions must exhibit "corruption," prejudicial misconduct or "willful misbehavior" to justify reversal. *Id.* Both standards focus on the conduct of an individual. The insidious or inherent bias of an unfairly weighted panel is not addressed, although it is even more likely to produce a prejudicial award. Review standards under the FAA are

similarly limited. Under § 10 an award may be vacated for "evident partiality or corruption in the arbitrators, or either of them." 9 U.S.C. § 10 (App. 18a).

Neither the Texas Act nor the FAA addresses the problem of structural bias on an arbitration panel. If the *structure* of the panel is flawed, bias may be manifested only in a massive damage award against HL&P, and HL&P could have the difficult task of proving that the award was *necessarily* the product of an individual's "evident partiality" or "corruption." Statutory appeals thus provide only limited grounds for review which cannot assure a result consistent with *Commonwealth Coatings*.

Even if the award were vacated on appeal, HL&P would still be denied due process. This Court has recognized that there is an independent denial of due process where a litigant is subjected to trial by a biased tribunal and has refused to require parties to submit to unfair proceedings merely because their due process rights might be salvaged on appeal. In *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973), for example, the Court found that where a quasi-judicial body "was incompetent by reason of bias to adjudicate the issues pending before it," a court "need not defer" and could intervene even though "judicial review, *de novo* or otherwise, would be forthcoming at the conclusion of the . . . proceedings." Similarly, in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the Court held that adjudicative procedure could not

> be deemed constitutionally acceptable *simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.*

Id. at 61-62 (emphasis added).

Here HL&P lacks even the prospect of delayed *de novo* review. The reality of arbitration before a partial and imbalanced forum, coupled with the narrow grounds for review afforded by the Texas Act and the FAA, argue *a fortiori* for intervention by this Court before under the doctrine articulated in *Berryhill* and *Ward*.

CONCLUSION

The Court should grant certiorari and set this case for argument. In an increasingly complex world, arbitration must be available as an alternative to litigation. Requiring at the outset that arbitration panels meet the requirements of due process will facilitate that ultimate goal.

Respectfully submitted,

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*Counsel of Record

January 27, 1992

(5)

Supreme Court, U.S.
FILED
JAN 27 1992
OFFICE OF THE CLERK

91-1230
No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,

Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST)

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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APPENDIX A

Order of the District Court of Dallas County, Texas Compelling Arbitration

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IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY, *et al.*,
Plaintiffs,

v.

CITY OF SAN ANTONIO, *et al.*,
Defendants.

ORDER

On the 21st day of June, 1990, came on to be heard the Original Pleas in Abatement and Applications for Order Compelling Arbitration and for Ancillary Relief of City of San Antonio and Central Power and Light Company (hereinafter "Defendants"), the Joint Supplemental Application of San Antonio and Central Power and Light Company for Order Compelling Arbitration (subject to their pleas in abatement), and Houston Lighting & Power Company's Special Exceptions to the Counterclaims of San Antonio and Central Power and Light Company (filed by them subject to their pleas in abatement and calls for arbitration); and the Court, having considered the filings of record in this case, particularly those which were the subject of the hearing, and having considered the briefs and supplemental briefs of counsel for the respective parties, and having heard and considered the

oral argument of counsel for the respective parties, is of the opinion that:

1. The South Texas Project Participation Agreement contains a valid and enforceable arbitration clause;

2. The disputes framed by the pleadings arise under the Participation Agreement and are arbitrable;

3. The Defendants' calls for arbitration have been timely and properly made;

4. The City of Austin, as a named participant, is not precluded from appointing an arbitrator; and

5. This case should be stayed pending arbitration by arbitrators appointed pursuant to Section 23.2 of the Participation Agreement.

IT IS ACCORDINGLY ORDERED, ADJUDGED AND DECREED that the Applications of the City of San Antonio and Central Power and Light Company for an Order Compelling Arbitration are GRANTED; and it is further

ORDERED, ADJUDGED AND DECREED that this litigation is and shall be stayed pending arbitration by a single panel of arbitrators appointed pursuant to Section 23.2 of the Participation Agreement; should City of Austin, as a named participant, appoint an arbitrator, and if necessary, to make the total number of arbitrators an odd number in accordance with Section 23.2 of the Participation Agreement, then the arbitrators so appointed shall elect one additional arbitrator.

SIGNED AND ENTERED THIS 22nd day of August, 1990, at 4:50 o'clock p.m.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
Presiding Judge
101st Judicial District Court
Dallas County, Texas

APPENDIX B

Order of the District Court of Dallas County, Texas Denying HL&P's Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration

---

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY, *et al.*,
Plaintiffs,

v.

CITY OF SAN ANTONIO, *et al.*,
Defendants.

ORDER

On the 24th day of January, 1991, came to be heard the Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration filed by Houston Lighting & Power Company ("HL&P"). The Court, having considered the motions, supporting briefs, and evidence supplied by the respective parties, and having heard and considered the oral argument of counsel for the respective parties, is of the opinion that the motions should be denied.

It is accordingly, ORDERED, ADJUDGED and DECREED that HL&P's Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration are denied.

Entered this 22 day of April, 1991.

/s/ Joseph B. Morris
JOSEPH B. MORRIS
Presiding Judge
101st Judicial District Court
Dallas County, Texas

APPENDIX C

Order of the Texas Court of Appeals at Dallas Denying Motion for Leave to File Petition for Writ of Mandamus

Order issued April 25, 1991

IN THE COURT OF APPEALS FIFTH DISTRICT OF TEXAS AT DALLAS

No. 05-91-00487-CV

HOUSTON LIGHTING AND POWER COMPANY,
Relator

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE,
Respondent

ORDER

Before Justices Stewart and Maloney

Relator's April 24, 1991 motion for leave to file petition for writ of mandamus is **DENIED.**

/s/ Frances Maloney
FRANCES MALONEY
Justice

APPENDIX D

Order of the Texas Supreme Court Overruling Motion for Leave to File Petition for Writ of Mandamus

---

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 19, 1991

RE: CASE NO. D-1033

STYLE: HOUSTON LIGHTING & POWER COMPANY
v. THE HONORABLE JOSEPH B. MORRIS, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case.

Sincerely,

JOHN T. ADAMS
Clerk

By Courtland Crocker
COURTLAND CROCKER
Deputy

cc: Honorable Joseph B. Morris

APPENDIX E

Order of the Texas Supreme Court Overruling Motion for Rehearing of Motion for Leave to File Petition for Writ of Mandamus

---

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

October 30, 1991

RE: CASE NO. D-1033

STYLE: HOUSTON LIGHTING & POWER COMPANY
v. THE HONORABLE JOSEPH B. MORRIS, JUDGE

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for rehearing of motion for leave to file petition for writ of mandamus in the above referenced case.

Sincerely,

JOHN T. ADAMS
Clerk

By Courtland Crocker
COURTLAND CROCKER
Deputy

cc: Honorable Joseph B. Morris

APPENDIX F

Excerpts from HL&P'S Motion for Appropriate Relief in Aid of Fair Arbitration

---

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY,

v.

CITY OF SAN ANTONIO, *et al.*,

HOUSTON LIGHTING & POWER COMPANY'S MOTION FOR APPROPRIATE RELIEF IN AID OF FAIR ARBITRATION

TO THE HONORABLE JOSEPH B. MORRIS:

I. Relief Requested

Now comes Houston Lighting & Power Company ("HL&P") and, subject to its Motion for Reconsideration, requests the Court to grant appropriate relief in aid of fair arbitration including, *inter alia*, the entry of orders providing for the composition of the arbitration panel, the qualifications and method of selection of arbitrators, and related guidelines and procedures ensuring impartial decisions. The requested actions are necessary to provide for fair arbitration and comply with due process requirements.

* * * *

II. The Court Has Jurisdiction to Grant the Relief Requested

As a court of equity, this Court has jurisdiction to structure the arbitration process so as to establish the fundamental fairness required by due process of law. *Lipschutz v. Gutwirth*, 106 N.E.2d 8, 11 (N.Y. 1952) ("Undoubtedly the [court] in acting in arbitration matters does act as a court of equity — it applies equitable principles and enjoys a certain latitude of discretion."); *Belanger v. State Farm Mutual Auto. Ins.*, 426 N.Y.S.2d 140, 141 (3d App. Div. 1980). Moreover, the Texas General Arbitration Act (the "Texas Act") authorizes the Court to grant, in advance of any arbitration proceedings, any relief necessary to permit orderly arbitration to proceed. TEX. REV. CIV. STAT. ANN. art. 235, Section G(v). All parties agree that the Texas Act is applicable to the [Participation Agreement (the "PA")]. Even absent such agreement, the choice of law provision in Section 23 of the PA requires application of state law to all procedural aspects of the arbitration, although the Federal Arbitration Act also applies. *Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford, Jr. University*, 109 S.Ct. 1248 (1989).

* * * *

III. Constitutional Due Process Considerations Require That Neutral Arbitrators Control the Arbitration

HL&P requests that the arbitration panel be structured so one or more Neutral Arbitrators effectively control the outcome; CPL and San Antonio apparently assert that the PA requires a panel of Party Representatives, numerically weighted in their favor, who are essentially advocates for each side of the dispute, surrogates for the parties themselves. The issue presented is identical to that decided in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), to wit: "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration." The Supreme Court determined

that Congressional intent in enacting the Federal Arbitration Act was "to provide not merely for *any* arbitration but for an impartial one." *Id.* at 147. Thus, the Court concluded that "any tribunal permitted by law to try cases and controversies not only must be unbiased but must also avoid even the appearance of bias." *Id.* at 150. U.S. Const. amends. V & XIV.

* * * *

Agreements to arbitrate implicate due process both because the arbitrator acts in a quasi-judicial capacity and because the power of the state is used to compel arbitration and enforce the award. "The parties may agree to any form of dispute resolution that they wish, but they may not seek the backing of the courts for private actions that, while substituting for the judicial function, are fraught with the appearance of bias." *Barcon Assocs.* v. *Tri-County Asphalt Corp.*, 430 A.2d 214, 222 (N.J. 1981); *Graham* v. *Scissor-Tail, Inc.*, 623 P.2d 165, 174 (Cal. 1981) (en banc) (holding that the "potential bias said to arise from the composition of the arbitral body should preclude enforcement of a contractual provision requiring arbitration before it" because the "minimum levels of integrity" required by courts had not been met).

* * * *

APPENDIX G

Excerpts from the Texas General Arbitration Act, Tex. Rev. Civ. Stat. Ann. Art. 224 et seq.

Art. 224. Validity of arbitration agreements

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A court shall refuse to enforce an agreement or contract provision to submit a controversy to arbitration if the court finds it was unconscionable at the time the agreement or contract was made.

* * * *

Art. 225. Proceedings to compel or stay arbitrations

Sec. A. On application of a party showing an agreement described in Article 224 of this Act, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

See. B. On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

See. C. If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under Section A of Article 234 of this Act, the application shall be made therein. Otherwise and subject to Article 235 of this Act, the application may be made in any court of competent jurisdiction.

See. D. Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under the provisions of this Article 225, or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

See. E. An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

Art. 226. Appointment of arbitrators by court

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party setting forth the nature of the issues to be arbitrated and the qualifications of the proposed arbitrators shall appoint one or more qualified arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

* * * *

Art. 235. Applications to courts and the effect thereof; court proceedings on applications to courts; venue thereof; stay of proceedings in another court pursuant to a later

application; what the court may require that an application contain; when applications may be filed in advance of or pending or at or after the conclusion of arbitration proceedings; acquisition of jurisdiction over adverse parties by service of process or in rem by ancillary proceedings; court relief in aid of pending or prospective arbitration proceedings or the enforcement of court orders or decrees or satisfaction of court judgments; court hearings on applications.

* * * *

Sec. G. In advance of the institution of any arbitration proceedings, but in aid thereof, an application may be filed for order or orders to be entered by the court, including but not limited to applications:

* * * *

(v) seeking any other relief, which the court can grant in its discretion, needed to permit the orderly arbitration proceedings to be instituted and conducted and to prevent any improper interference or delay thereof.

* * * *

Art. 236. Confirmation of an award

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Articles 237 and 238 of this Act.

Art. 237. Vacating an award

Sec. A. Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct or wilful misbehavior of any of the arbitrators prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Article 228, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Article 225 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

Sec. B. An application under this Article shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

Sec. C. In vacating the award on grounds other than stated in paragraph 5 of Section A of this Article, the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with the provisions of Article 226; or, if the award is vacated on grounds set forth in paragraphs 3 and 4 of Section A of this Article, the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with the provisions of Article 226. The time within which the

agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

Sec. D. If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

* * * *

APPENDIX H

Excerpts from the Federal Arbitration Act, 9 U.S.C. § 1 et seq.

* * * *

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

* * * *

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

* * * *

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of title 5.

* * * *

APPENDIX I

Excerpts from the South Texas Project Participation Agreement

1. PARTIES: The parties to this agreement are: CITY OF SAN ANTONIO, acting through the City Public Service Board of San Antonio, hereinafter referred to as "San Antonio"; CENTRAL POWER AND LIGHT COMPANY, a Texas corporation, hereinafter referred to as "Central"; HOUSTON LIGHTING & POWER COMPANY, a Texas corporation, hereinafter referred to as "Houston"; and the CITY OF AUSTIN, hereinafter referred to as "Austin".

2. RECITALS: The parties, having completed a feasibility study, desire to enter into this Participation Agreement providing for the licensing, construction, operation and maintenance of jointly owned and operated electric generation facilities to be known as the South Texas Project.

3. AGREEMENT: In consideration of the mutual covenants herein, the parties agree as follows:

* * * *

9. ADMINISTRATION:

9.1 As a means of securing effective cooperation and interchange of information and of providing consultation on a prompt and orderly basis among the Participants in connection with various administrative and technical problems which may arise from time to time in connection with the terms and conditions of this Participation Agreement, the Participants hereby establish the Management Committee.

9.2 The Management Committee shall be composed of one primary representative of each Participant, who shall be an officer or general manager of the Participant, and an alternate, both of

whom shall be designated by the Participant represented by written notice to all other Participants.

* * * *

9.4 All matters coming under the authority of the Management Committee shall be decided by agreement of the representatives of two or more Participants having in excess of sixty percent (60%) ownership interest in the Generating Unit or Units affected by the decision, except as otherwise specifically provided in this Participation Agreement. For the purposes of this Section 9.4 decisions affecting the Common Station Facilities or a portion of the Common Station Facilities shall be deemed to affect all Generating Units then served by the Common Station Facilities or portion thereof affected by the decision. All decisions reached by the Management Committee on matters concerning the South Texas Project and properly before the Management Committee for decision pursuant to the terms of this Participation Agreement shall be binding upon all Participants.

* * * *

14.2 Each Participant shall pay its share of construction costs in accordance with requests for funds submitted by the Project Manager.

* * * *

23. ARBITRATION:

23.1 If a dispute (other than as to a decision made under Section 9.4 hereof) between any of the Participants should arise under this Participation Agreement or the Project Agreements, any Participant may call for submission of the dispute to arbitration, which call shall be binding upon all other Participants. Except as specifically provided in this Participation Agreement or in the Project Agreements, the arbitration shall be governed by

the Texas General Arbitration Act of 1965, as same may be amended at the time of the call for arbitration. The costs and expenses of the arbitrators shall be shared equally by the Participants participating in the arbitration, unless otherwise decided by the arbitrators.

23.2 Any Participant calling for arbitration shall make such call by written notice to all other Participants, naming in such notice one arbitrator. Upon receipt of a written demand for arbitration, each additional Participant or combination of Participants having not less than fifteen percent (15%) Plant Ownership Interest if the dispute is not limited to matters relating to a single Generating Unit, or each Participant or combination of Participants having not less than a fifteen percent (15%) Generation Entitlement Share in the applicable Generating Unit if the dispute is limited to a single Generating Unit, may appoint one additional arbitrator. If necessary to make the total number of arbitrators an odd number, the arbitrators so appointed shall elect one additional arbitrator. The initial meeting of the arbitrators shall be at a place in Texas named by the Participant making the demand for arbitration. Thereafter, the arbitrators shall meet at such place or places in Texas as they deem appropriate. The decision of a majority of the arbitrators so appointed shall be binding on all Participants, and the Participants hereby consent to the entry of a judgment in any court of competent jurisdiction confirming and implementing the decision of the arbitrators.

* * * *

APPENDIX J

Excerpts from the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes

* * * *

CANON VII.
ETHICAL CONSIDERATIONS RELATING TO ARBITRATORS APPOINTED BY ONE PARTY

Introductory Note:

In some types of arbitration in which there are three arbitrators it is customary for each party, acting alone, to appoint one arbitrator. The third arbitrator is then appointed either by agreement of the parties or of the two arbitrators, or, failing such agreement, by an independent institution or individual. In some of these types of arbitration, all three arbitrators are customarily considered to be neutral and are expected to observe the same standards of ethical conduct. However, there are also many types of tripartite arbitration in which it has been the practice that the two arbitrators appointed by the parties are not considered to be neutral and are expected to observe many — but not all — of the same ethical standards as the neutral third arbitrator. For the purposes of this Code, an arbitrator appointed by one party who is not expected to observe all of the same standards as the third arbitrator is referred to as a "non-neutral arbitrator." This Canon VII describes the ethical obligations which non-neutral party-appointed arbitrators should observe and those which are not applicable to them.

In all arbitrations in which there are two or more party-appointed arbitrators, it is important for every one concerned to know from the start whether the party-appointed arbitrators are expected to be neutrals or non-neutrals. In such arbitrations, the two party-appointed arbitrators should be considered non-neutrals

unless both parties inform the arbitrators that all three arbitrators are to be neutral, or unless the contract, the applicable arbitration rules, or any governing law requires that all three arbitrators are to be neutral.

It should be noted that in cases where the arbitration is conducted outside the United States the applicable law may require that all arbitrators be neutral. Accordingly, in such cases the governing law should be considered before applying any of the following provisions relating to non-neutral party-appointed arbitrators.

A. Obligations Under Canon I:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon I to uphold the integrity and fairness of the arbitration process, subject only to the following provisions:

(1) Non-neutral arbitrators may be predisposed toward the party who appointed them but in all other respects are obligated to act in good faith and with integrity and fairness. For example, non-neutral arbitrators should not engage in delaying tactics or harassment of any party or witness and should not knowingly make untrue or misleading statements to the other arbitrators.

(2) The provisions of Canon I-D relating to relationships and interests are not applicable to non-neutral arbitrators.

B. Obligations Under Canon II:

Non-neutral party-appointed arbitrators should disclose to all parties, and to the other arbitrators, all interests and relationships which Canon II requires be disclosed. Disclosure as required by Canon II is for the benefit not only of the party who appointed the non-neutral arbitrator, but also for the benefit of the other parties and arbitrators so that they may know of any bias which may exist

or appear to exist. However, this obligation is subject to the following provisions:

(1) Disclosure by non-neutral arbitrators should be sufficient to describe the general nature and scope of any interest or relationship, but need not include as detailed information as is expected from persons appointed as neutral arbitrators.

(2) Non-neutral arbitrators are not obligated to withdraw if requested to do so by the party who did not appoint them, notwithstanding the provisions of Canon II-E.

C. Obligations Under Canon III:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon III concerning communications with the parties, subject only to the following provisions:

(1) In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, non-neutral arbitrators may consult with the party who appointed them concerning the acceptability of persons under consideration for appointment as the third arbitrator.

(2) Non-neutral arbitrators may communicate with the party who appointed them concerning any other aspect of the case, provided they first inform the other arbitrators and the parties that they intend to do so. If such communication occurred prior to the time the person was appointed as arbitrator, or prior to the first hearing or other meeting of the parties with the arbitrators, the non-neutral arbitrator should at the first hearing or meeting, disclose the fact that such communication has taken place. In complying with the provisions of this paragraph, it is sufficient that there be disclosure of the fact that such communication has occurred without disclosing the content of the communication. It is also sufficient to disclose at any time the intention to follow

the procedure of having such communications in the future and there is no requirement thereafter that there be disclosure before each separate occasion on which such a communication occurs.

(3) When non-neutral arbitrators communicate in writing with the party who appointed them concerning any matter as to which communication is permitted under this Code, they are not required to send copies of any such written communications to any other party or arbitrator.

D. Obligations Under Canon IV:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon IV to conduct the proceedings fairly and diligently.

E. Obligations Under Canon V:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon V concerning making decisions, subject only to the following provision:

(1) Non-neutral arbitrators are permitted to be predisposed toward deciding in favor of the party who appointed them.

F. Obligations Under Canon VI:

Non-neutral party-appointed arbitrators should observe all of the obligations of Canon VI to be faithful to the relationship of trust inherent in the office of arbitrator, subject only to the following provision:

(1) Non-neutral arbitrators are not subject to the provisions of Canon VI-D with respect to any payments by the party who appointed them.

APPENDIX K

Excerpts from the American Arbitration Association Commercial Arbitration Rules

* * * *

12. Qualifications of an Arbitrator

Any neutral arbitrator appointed pursuant to Section 13, 14, 15, or 54, or selected by mutual choice of the parties or their appointees, shall be subject to disqualification for the reasons specified in Section 19. If the parties specifically so agree in writing, the arbitrator shall not be subject to disqualification for those reasons.

Unless the parties agree otherwise, an arbitrator selected unilaterally by one party is a party-appointed arbitrator and is not subject to disqualification pursuant to Section 19.

The term "arbitrator" in these rules refers to the arbitration panel, whether composed of one or more arbitrators and whether the arbitrators are neutral or party appointed.

* * * *

19. Disclosure and Challenge Procedure

Any person appointed as neutral arbitrator shall disclose to the AAA any circumstance likely to affect impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others. Upon objection of a party to the continued service of a neutral arbitrator, the AAA shall determine whether the arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive.

* * * *

APPENDIX L

Form of Neutrality Oath Taken by Arbitrators for CPL, San Antonio and Austin

STATE OF TEXAS }
COUNTY OF }

. . . . . , being duly sworn, hereby accepts this appointment as a neutral arbitrator and will faithfully, fairly and impartially hear and examine the matters in controversy between the above-named parties, in accordance with their arbitration agreement and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, and will make a just award according to the best of his understanding.

Dated: . . . ., 1990.

Signed: _____
ARBITRATOR

SUBSCRIBED AND SWORN TO BEFORE ME, on this the . . . day of . . . ., 1990, to certify which witness my hand and seal of office.

_____
Notary Public, State of Texas

APPENDIX M

Affidavit of Neil A. Eisner

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS
101ST JUDICIAL DISTRICT

No. 88-6923-E

HOUSTON LIGHTING AND POWER COMPANY,
v.
CITY OF SAN ANTONIO, *et al.*,

AFFIDAVIT OF NEIL A. EISNER

STATE OF TEXAS }
COUNTY OF TRAVIS }

Neil A. Eisner, being duly sworn, deposes and says:

Qualification of Witness

1. My name is Neil A. Eisner. Attached as Exhibit A is my *résumé*. In addition to the information in my *résumé*, following receipt of my law degree I practiced law for four years and I have remained a member in good standing of the New York bar. I have spent most of my life specializing in municipal utilities and in the financing of major generation and transmission projects, particularly for municipal entities located in Texas and have spent considerable time studying and analyzing the electric utility systems of both Austin and San Antonio. My education and experience have given me qualifications in the area of municipal and corporate utility finance and underlying security agreements, such as ordinances and trust indentures, utilized in securing financing.

Purpose of Affidavit and Conclusion Reached

2. I have been asked by attorneys for Houston Lighting & Power Company ("HL&P") to review certain data and to make a determination concerning the pecuniary effect upon [arbitrators] Mr. Fred Shannon and Mr. Harold Scherr of a substantial recovery by City Public Service Board of San Antonio (CPS) against Houston Lighting & Power Company. Assuming that CPS successfully asserts a claim against HL&P similar in nature to that asserted by City of Austin, I have concluded that the direct, pecuniary benefits to Mr. Shannon and Mr. Scherr would be as follows:

Mr. Fred Shannon

2/89 - 1/90 Electric Bill	$1,627.11	
2/89 - 1/90 kWh	24,336	
	Low	High
Direct Pecuniary Benefit	$4,164.82	$6,863.37
Present Value of the Benefit	$1,943.32	$3,202.47

Mr. Harold Scherr

2/89 - 1/90 Electric Bill	$1,594.76	
2/89 - 1/90 kWh	24,168	
	Low	High
Direct Pecuniary Benefit	$4,136.07	$6,815.99
Present Value of the Benefit	$1,929.90	$3,180.36

Method of Making Computation

3. The computation which I performed was as follows. By reviewing the testimony of Mr. Robert Gross and the exhibit he sponsored in the case of *City of Austin v. Houston Lighting & Power Company*, I have determined that the City of Austin, based on its sixteen percent ownership interest in the South Texas Project, claimed damages against HL&P in the range of $534 million to $880 million dollars. I have assumed that CPS

would assert similar claims but that the figures would be larger because CPS's interest in the South Texas Project is twenty-eight percent rather than sixteen percent. Applying this assumption, CPS's claims would be in the range of $935 million to $1.540 billion.

4. The electric usage of Mr. Shannon and Mr. Scherr was determined from data supplied by CPS. *See* Exhibit C.

5. From the CPS 1989-1990 Annual Report I have determined that CPS sold 11.703 billion kilowatt hours in the period February 1989 through January 1990, and that the usage of Mr. Shannon and Mr. Scherr in the same period constituted .000208 and .000207 percent, respectively, of the total kilowatt hours sold. Applying these percentages to the total damages produces the range of the "Present Value of the Benefit" figures set forth in paragraph 2. These amounts represent the *minimum* current cash value of the benefits that would be received over a period of years regardless of the manner in which the funds were spent so long as they were invested in a responsible and rational manner to benefit the utility system.

6. The "Direct Pecuniary Benefit" amounts in paragraph 2 assume that the recovery is used by CPS to reduce outstanding debt. These benefits would accrue over a period of years in the form of lower electric rates.

Benefits From Litigation Are Benefits to CPS Ratepayers

7. I have reviewed the Trust Indenture of the City of San Antonio, Texas, dated February 1, 1951, which grants to a Trustee for those institutions which own the City of San Antonio's Electric and Gas Systems Old Series Bonds a security interest in all the properties and revenues of San Antonio's Electric and Gas Systems. I have also reviewed the terms of the ordinance securing the New Series Bonds. Based on a lifetime of experience interpreting documents of this nature and the relation-

ships which they create, it is clear that any recovery by CPS against HL&P arising from alleged breaches of the South Texas Project Participation Agreement would of necessity remain within the City of San Antonio Electric and Gas Systems for the benefit of its creditors and ratepayers and that such recovery could be used only to benefit the ratepayers who have borne the expense and risk of STP and who are ultimately obligated to discharge the indebtedness incurred to build STP.

Documents Relied Upon

8. In performing the computations upon which this affidavit is based I have reviewed and relied upon the documents listed in Exhibit B. These documents are the type of documents reasonably relied upon by experts in my field of specialty in making studies about and drawing conclusions concerning municipal utilities and their ratepayers.

/s/ Neil A. Eisner
NEIL A. EISNER

SWORN TO AND SUBSCRIBED BEFORE ME, this 15th day of January, 1991.

KATHLEEN HARRISON
Notary Public, State of Texas

KATHLEEN HARRISON
Notary Public, State of Texas
My Commission Expires
Dec. 20, 1993

Supreme Court, U.S.
FILED
FEB 26 1992
OFFICE OF THE CLERK

No. 91-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(City of San Antonio and Central Power and Light Company, Real Parties in Interest)
Respondents.

CENTRAL POWER AND LIGHT COMPANY'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI

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February 26, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

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Respondents.

CENTRAL POWER AND LIGHT COMPANY'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI

Respondent Central Power and Light Company ("CPL") respectfully prays that the Court deny Petitioner Houston Lighting and Power Company's ("HL&P") Petition for Writ of Certiorari. The decision HL&P complains of is an interlocutory order of a Texas district court judge compelling arbitration of a dispute between HL&P and the City of San Antonio, acting by and through City Public Service Board of San Antonio, ("San Antonio") and CPL. The Dallas Court of Appeals and the Texas Supreme Court both refused to review the district court's interlocutory order. Under Texas law, both courts lacked jurisdiction to grant the relief sought by HL&P. Neither Judge Morris' decision to compel arbitration nor the decisions of the Dallas Court of Appeals and the Texas Supreme Court are final judgments within this Court's

jurisdiction. Until there is a complete record, until the arbitration has been conducted and until the Texas courts of appeal have addressed the issues raised by HL&P, this dispute is not ripe for review by the United States Supreme Court.

STATEMENT OF THE CASE

The Statement of the Case submitted by HL&P does not accurately recount the procedural history of this dispute and mischaracterizes the factual record before the Texas district court judge when he ruled. The brief in opposition submitted by San Antonio points out in sufficient detail the defects in HL&P's Statement of the Case, and CPL will rely on and incorporate San Antonio's Statement of the Case rather than duplicate San Antonio's efforts. CPL suggests to the Court, however, that the parties' disagreement as to the factual record and procedural history indicate the importance of allowing the Texas district court to enter a final, appealable order and allowing the Dallas Court of Appeals and the Texas Supreme Court to review the issues raised by HL&P with a complete record before them. The limitations of the record make it inappropriate for the Court to rule at this time. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 575 (1947).

SUMMARY OF THE ARGUMENT

The United States Supreme Court lacks jurisdiction to review this interlocutory state court order compelling arbitration. The Court must examine the effect rather than the form of the decisions complained of to determine their finality. The effect of the decisions complained of by HL&P is to allow a dispute to pro-

ceed to arbitration. Under federal and state law, it is clear that decisions compelling arbitration are not final judgments. Moreover, under state law, the Texas courts of appeal were without jurisdiction to consider HL&P's complaints and could not render any decision, final or otherwise, on the issues raised by HL&P. The absence of a final judgment deprives this Court of jurisdiction to accept HL&P's Petition for Writ of Certiorari; and, the interlocutory status of this case, with all of its unresolved questions, indicates that, even if jurisdiction existed, this Court should exercise its discretion to deny HL&P's petition.

REASONS FOR DENYING HL&P'S PETITION

I. This Court lacks jurisdiction to review Judge Morris's interlocutory order.

The United States Supreme Court has jurisdiction over a case from a state court only if a final judgment has been rendered by the state's highest court. 28 U.S.C. § 1257. The order HL&P seeks to have the United States Supreme Court review is an interlocutory decision of a state district court judge to stay litigation and to compel arbitration. Under federal law, decisions which result in stays of litigation pending arbitration are clearly not "final judgments" reviewable by the Supreme Court. Similarly, under Texas law, decisions staying litigation and compelling arbitration are not reviewable by appeal or by mandamus. The Dallas Court of Appeals and the Texas Supreme Court lacked jurisdiction to consider the issues raised by HL&P at the time HL&P attempted to raise them, and the Texas appellate courts properly refused to issue any decision based on HL&P's arguments. This Court's jurisdiction has not been prop-

erly invoked; there has been no "final judgment" by any Texas court.

A. Under federal law, decisions compelling arbitration are not "final judgments".

This Court has consistently ruled that decisions staying litigation and compelling arbitration are not "final judgments". *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 179 (1955); *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 456 (1935); *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449, 451 (1935). The United States Court of Appeals for the Fifth Circuit has recently reemphasized the clarity of this Court's prior decisions holding that decisions compelling arbitration are interlocutory and not final decisions appealable under 28 U.S.C. § 1291. *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402, 405 (5th Cir. 1989). As this Court is well aware, the scope of "final judgments" which this Court can review under 28 U.S.C. § 1257 is at least as narrow, if not more narrow, than the scope of "final decisions" reviewable by federal appellate courts under 28 U.S.C. § 1291. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976);*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 502-03 (1975) (Rehnquist, J., dissenting); *In re Tiffany*, 252 U.S. 32, 36 (1920). If decisions compelling arbitration are not sufficiently final for review under 28 U.S.C. § 1291, then such decisions are also not reviewable by this Court under 28 U.S.C. § 1257. The Court should deny HL&P's attempt to obtain certiorari review of an interlocutory state district court decision for lack of jurisdiction.

B. The Texas Supreme Court has not rendered a "final judgment".

Contrary to HL&P's argument, the Texas Supreme Court has not taken any action which would qualify as a final judgment. In both the Dallas Court of Appeals and the Texas Supreme Court, HL&P filed motions for leave to file a petition for writ of mandamus. Neither the Dallas Court of Appeals nor the Texas Supreme Court issued any decision on HL&P's petitions for writ of mandamus. Instead, both courts implicitly recognized that they lacked jurisdiction to consider HL&P's premature request for review. Both courts expressly declined to consider the merits of HL&P's position and denied HL&P's motion for leave. The denial of a motion for leave to file a petition for writ of mandamus is hardly a final judgment. The denial of the motion for leave clearly anticipates further litigation and the development of a complete record for the possibility of a later, timely appeal.

This Court's precedent makes it clear that the Texas Supreme Court's decision to deny HL&P's motion for leave to file a premature appellate proceeding is not a final judgment. The limited mandamus actions which this Court has previously deemed final judgments have involved decisions by the highest state court on the merits of the issues raised by the petition for writ of mandamus. *See Detroit & Mackinac Railway Co. v. Michigan Railroad Commission*, 240 U.S. 564, 570-71 (1916); *Davies v. Corbin*, 112 U.S. 36, 40 (1884). The Court's seminal case concerning the issue of when a mandamus proceeding is a final judgment discusses the importance of a decision on the merits by the lower court. *Davies v. Corbin*, 112 U.S. at 40. It is the decision on the merits that renders a mandamus

proceeding final. *Id.* It follows that there can be no final judgment when a court refuses to consider the merits. Certainly, a court does not render a final judgment when it denies a motion for leave to file a petition for writ of mandamus because the court lacks jurisdiction to grant the motion. This is such a case.

The Federal Arbitration Act expressly prohibits interlocutory appeals of decisions staying litigation and compelling arbitration. 9 U.S.C. § 16. The Texas Arbitration Act likewise prohibits parties from pursuing interlocutory appeals of decisions compelling arbitration. Tex. Rev. Civ. Stat. Ann. art. 238-2 (Vernon 1973); *Bethke v. Polyco, Inc.*, 730 S.W.2d 431, 434 (Tex. App.—Dallas 1987, n.w.h.). Texas courts have uniformly recognized the wisdom of the Texas legislature's policy choice, and have expressly held that decisions compelling arbitration cannot be reviewed by petition for writ of mandamus:

> If we assume, while not deciding, that the court incorrectly compelled arbitration, the resulting delay is no more onerous than being forced to try a case in an inappropriate venue, or suffering an incorrect ruling on a plea to the jurisdiction, a plea in abatement, or any other interlocutory order that is not subject to correction by mandamus.

McMullen v. Yates, 697 S.W.2d 500, 502 (Tex. App.—San Antonio 1985, orig. proceeding). Under Texas law, interlocutory review by mandamus to the Texas court of appeals and Texas Supreme Court is not available "because relator has an appeal available once a final judgment is entered and he loses no contract rights or benefits by availing himself of arbitration."

Shearson Lehman Hutton, Inc. v. McKay, 763 S.W.2d 934, 938-39 (Tex. App.—San Antonio 1989, orig. proceeding).

Under Texas procedural law, the decision of the state district court of which HL&P complains is not reviewable by either appeal or by mandamus. In adhering to Texas law, the Dallas Court of Appeals and the Texas Supreme Court both declined to review Judge Morris's interlocutory decision. The Dallas Court of Appeals and the Texas Supreme Court did not refuse to grant the relief HL&P requested, instead both courts recognized that HL&P's request for review was premature and that the appellate courts lacked jurisdiction. The only action taken by the Dallas Court of Appeals was the issuance of an order denying HL&P's motion for leave to file a petition for writ of mandamus. The Texas Supreme Court likewise only refused HL&P's motion for leave. Neither action is a final judgment; both courts may fully consider the issues raised by HL&P on a timely appeal. Neither court considered the merits of HL&P's arguments; their actions merely indicate that HL&P's request for review is premature.

In addition, the Court must give more weight to the substance and effect of the Texas Supreme Court's action than the form in which HL&P attempted to disguise its interlocutory appeal. The Court's decisions consistently recognize that a decision is final only when the decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 299, 233 (1945). A decision is not final if the decision ensures further action by the lower courts. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271,

275 (1988). A decision which has the effect of allowing an arbitration to proceed is simply not a final judgment. *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d at 405. "While an order granting a stay postpones active litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or in some cases, to renew the litigation despite the arbitration award." *Id.* The effect of the Texas Supreme Court's decision to deny HL&P's motion was to allow the dispute to continue towards resolution, not to render any final decision in the dispute.

This Court lacks jurisdiction to review the actions of a Texas district court judge until Texas's highest court of appeal reviews his decision. The Texas Supreme Court has deferred review by denying HL&P's motion for leave to file a petition for writ of mandamus. The Texas Supreme Court could not have rendered a final decision when the court did not even have jurisdiction to consider the questions presented. This Court lacks jurisdiction to consider HL&P's premature petition for writ of certiorari.

II. Alternatively, this Court should exercise its discretion to deny HL&P's Petition.

"A review on writ of certiorari is not a matter of right, but of judicial discretion." United States Supreme Court Rule 10.1. While Rule 10 does not limit the Supreme Court's discretion, it does indicate when the Court's discretion should be exercised in favor of granting review. All of the examples given in Rule 10 concern decisions by other courts of appeal. As noted in the preceding section, there has been no decision by either the Dallas Court of Appeals or the Texas Supreme Court. These courts found HL&P's

request for review premature and that they lacked jurisdiction to review the issues raised by HL&P. Under Texas law, these courts cannot and will not consider the issues raised by HL&P until after a final judgment is entered by the state district court judge. This Court's prior decisions indicate that the Court should deny HL&P's Petition for Writ of Certiorari and allow the Texas courts of appeal to consider these issues when they are ripe for review. If, after the Texas courts of appeal have ruled, HL&P is still dissatisfied, HL&P will not be barred from seeking review from this Court.

The United States Supreme Court has consistently adhered to its self-named "policy of strict necessity" in disposing of constitutional issues. *New York v. Uplinger*, 467 U.S. 246, 251(1984) (Stevens, J., concurring); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 568 (1947). Among the most significant factors analyzed by the Court in past decisions concerning the strict necessity for action has been the prematurity of the petitioner. "Fundamental principles of constitutional adjudication counsel against premature consideration of constitutional questions and demand that such questions be presented in a context conducive to the most searching analysis possible." *New York v. Uplinger*, 467 U.S. at 251 (Stevens, J., concurring). The Court has repeatedly declined review when actions by lower appellate courts could obviate the need for action by the Court. "[J]urisdiction here should only be exerted when the jurisdictional question presented by the proceeding in prohibition tenders the underlying constitutional issues in clean-cut and concrete form, unclouded by any serious problem of construction relating either to the

terms of the questioned legislation or to its interpretation by the state courts." *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. at 584.

This case is not properly before the Court. The lower courts of appeal did not rule against HL&P or affirm Judge Morris. The lower courts of appeal merely refused HL&P's invitation to make a premature ruling on the incomplete record presented by an extraordinary, interlocutory appellate proceeding. The wisdom of the appellate courts' abstention is clear. HL&P's concerns can be addressed in a variety of ways before a final judgment is entered: the challenged arbitrators may recuse themselves if asked to do so by HL&P; the challenged arbitrators may rule in HL&P's favor; the challenged arbitrators may, by their actions, convince HL&P of their neutrality; the state district court may vacate any tainted award and order an appropriate remedy; the Dallas Court of Appeals may resolve HL&P's concerns if and when it reviews Judge Morris's final order; and, the Texas Supreme Court may settle the issues after reviewing a full record and a final order. Precedent dictates that the Court should await all of these possibilities. "[The] questions tendered by this claim are not presented by the record with sufficient clarity to require or justify their decision." *Mishkin v. New York*, 383 U.S. 502, 512-13 (1966). The policy of strict necessity suggests that this case is not ripe for review at this level. The Court should deny HL&P's Petition for Writ of Certiorari.

CONCLUSION

Central Power and Light Company respectfully prays that the Court deny Houston Lighting and

Power Company's Petition for Writ of Certiorari. HL&P has delayed this arbitration for four years since CPL and San Antonio first called for arbitration in March of 1988. Because HL&P has successfully delayed arbitration, there is no final judgment for the Court to review, and jurisdiction is lacking. On both a jurisdictional and a discretionary basis, the Court should conclude that this case is not ripe for review and should deny HL&P's Petition for Writ of Certiorari.

Respectfully submitted,

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February 26, 1992

Supreme Court, U.S.
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No. 91-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST)
Respondents.

CITY OF SAN ANTONIO'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. Does the United States Supreme Court have jurisdiction of a petition for writ of certiorari to challenge certain orders entered by a Texas state court which are not final and not appealable, and which were entered more than nine months prior to the filing of the petition?

2. Is there any denial of due process where a Texas state court compels arbitration of a dispute in precise accordance with the arbitration agreement of the parties, and with a majority of the panel controlled by neutral arbitrators?

LIST OF PARTIES

Houston Lighting & Power Company

Petitioner,

City of San Antonio, Texas, acting by and through City Public Service Board of San Antonio
Central Power and Light Company
City of Austin, Texas
Honorable Joseph B. Morris, Judge of the 101st Judicial District Court of Dallas County, Texas

Respondents.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1230

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(City of San Antonio and Central Power
And Light Company, Real Parties in Interest)
Respondents.

CITY OF SAN ANTONIO'S BRIEF IN OPPOSITION TO HOUSTON LIGHTING AND POWER COMPANY'S PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

On January 27, 1992, Petitioner Houston Lighting & Power Company ("HL&P") filed a Petition for Writ of Certiorari challenging orders entered by a state district court in Texas on August 22, 1990, and April 22, 1991. The first order granted Respondent's Motion to Stay Litigation and Compel Arbitration; the second order denied Petitioner's Motion and Supplemental Motion for Appropriate Relief in Aid of Fair Arbitration, which rehashed the same arguments made by Petitioner in opposing Respondent's original motion. Because the orders were entered more than ninety (90) days prior to HL&P's Petition, the Petition

is untimely; because the orders are not final, they are not subject to review; and because Petitioner's due process claim is groundless, the Petition for Writ of Certiorari must be denied.

STATEMENT OF THE CASE

While Petitioner's Statement of the Case is replete with factual misstatements and omissions, Respondent will address only those which are germane to this proceeding. Petitioner's key misstatement, illustrative of the false premise of its entire Petition, is that the state district court has required Petitioner to submit to arbitration of claims against it by a majority vote of a panel, "when the panel majority has been appointed by the plaintiffs [Petitioner's Questions Presented for Review, No. 1]." The truth is that in accordance with the order of the Texas state court complained of (Petitioner's App. 1a), the claims against Petitioner will be decided by a panel of five arbitrators, of which the only one *not* neutral will be the one appointed by Petitioner itself. The state court's order provided (Petitioner's App. 2a) that "this case should be stayed pending arbitration by arbitrators appointed pursuant to Section 23.2 of the Participation Agreement" which specifies (Petitioner's App. 21a) that each of the four project participants may appoint one arbitrator, and if necessary to make the total number of arbitrators an odd number, the arbitrators so appointed shall elect one additional arbitrator. To date, all four participants have appointed arbitrators, who have deferred appointing the fifth arbitrator pending the resolution of Petitioner's myriad efforts to delay the arbitration.

Contrary to the predicate of Petitioner's entire argument, there is no panel majority biased against

Petitioner. First of all, Petitioner concedes that, *other than* the arbitrator appointed by Petitioner, each of the other three appointed arbitrators has taken a sworn oath to perform as a neutral arbitrator and to "faithfully, fairly and impartially hear and examine the matters in controversy between the above-named parties, in accordance with their Arbitration Agreement and the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes" (Petitioner's App. 27a). Nonetheless, Petitioner makes the groundless and insulting assertion that despite that oath, appointees who know they were chosen by a party to a dispute cannot be considered neutrals.

Even ignoring for the moment Petitioner's paranoid and unsubstantiated misperception, and ignoring as well Petitioner's sufficient legal remedy to avoid any adverse arbitration award shown to be the product of evident partiality, there is still no basis for Petitioner's analysis: there are only two parties making arbitration claims against the Petitioner, San Antonio and CPL. The remaining project participant, City of Austin, has no arbitration claims pending, though it was permitted by the court to appoint an arbitrator, in accordance with the parties' Arbitration Clause. Significantly, Petitioner *urged* the trial court to allow City of Austin to appoint an arbitrator to assure the fairness of the panel and compliance with the Arbitration Clause. Petitioner argued "[i]f one panel is to determine all disputes, then HL&P, Austin, CPL and San Antonio are entitled to appoint arbitrators, and at least one clearly impartial arbitrator must then be selected" (Respondent's App. 5a). Petitioner successfully insisted in the state court that all participants were entitled to arbitrators and that

a panel composed of four party-appointed arbitrators and a fifth neutral is what the parties intended in their agreement (Respondent's App. 5a). Petitioner investigated the qualifications of City of Austin's sworn-to-be-neutral arbitrator, Mr. John Lawrence, and reported to the trial judge "Austin's designated arbitrator is a disinterested and impartial arbitrator" (Respondent's App. 5a). In accordance with Petitioner's urging, the state court permitted City of Austin's appointment of an arbitrator (Petitioner's App. 2a).

Now, as Petitioner has virtually exhausted its quiver of procedural arrows to delay an arbitration requested by Respondent in March 1988, its analysis has conveniently taken a 180-degree turn. Thus, Petitioner now suggests (Petition p. 6) that the state court's permitting City of Austin to appoint an arbitrator "exacerbated the problem," relying upon the pendency of a different claim in a different forum by City of Austin against Petitioner to support the proposition that City of Austin's sworn neutral arbitrator is actually aligned against Petitioner. This contention is not credible, since that City of Austin claim against Petitioner was *already* in litigation, both at the time City of Austin appointed Mr. John Lawrence its arbitrator, and at the time Petitioner urged the state court that he was "disinterested and impartial" and that his appointment should be allowed (Respondent's App. 5a). HL&P's attempt to rewrite history to concoct its "stacked deck" arbitration panel argument must not be countenanced, and the entire hypothesis of its Petition that the "panel majority has been appointed by the plaintiffs" is simply untrue—sufficient

reason without more for this Court to deny its Petition for Writ of Certiorari.

Petitioner is likewise guilty of other misstatements, which are of less import to the Court's decision, but which Respondent cannot leave unchallenged. Attempting to fabricate a bias argument, Petitioner presented an affidavit to the state court based on total speculation as to the nature and amount of Respondent's claims, and speculation as to the utilization Respondent would make of any funds received through an arbitration award, and the potential financial stake of arbitrators. Petitioner's hypotheses were opposed by affidavit (Respondent's App. 1a), were carefully considered by the state court, and were properly rejected. Petitioner failed to substantiate, either factually or by competent legal authority, its argument that an arbitrator (or judge for that matter) is automatically disqualified from participating in a case simply by reason of his being a ratepayer of an involved utility. Such a premise would typically disqualify all judges in any jurisdiction from presiding in any case involving any utility therein, and is simply not the law. *In re New Mexico Natural Gas Antitrust Litigation,* 620 F.2d 794, 795-7 (10th Cir. 1980); *In re Virginia Electric & Power Co.,* 539 F.2d 357, 366-9 (4th Cir. 1976).

Petitioner criticizes the Texas district judge for not taking what it calls "corrective steps" (Petition p. 8), suggesting various and sundry methods of composing alternative arbitration panels. The simple answer to that criticism is that the district judge ordered "arbitration by arbitrators appointed pursuant to Section 23.2" of the parties' agreement, thus binding Petitioner to the arbitration agreement it bargained

for, rather than substituting some other terms newly proposed by Petitioner.

Finally, in a factual statement which is of limited relevance herein, but which is grossly inaccurate, Petitioner states (Petition p. 4), with respect to a lawsuit by City of Austin against Petitioner: "A jury found that the cost of STP had not been increased by any failure of HL&P to perform its duties as Project Manager." This is a rank misrepresentation by Petitioner. In fact, the trial court in that case refused City of Austin's request to even submit to the jury the quality of Petitioner's performance of its duties as Project Manager. It is that very refusal which is the focal point of City of Austin's pending appeal in the Texas Court of Appeals at Dallas.

SUMMARY OF ARGUMENT

The United States Supreme Court lacks jurisdiction of the Petition for Writ of Certiorari because it was filed out of time, being filed more than nine months after entry of one of the orders that it challenges, and more than 17 months after entry of the other. Moreover, the Texas state court orders attacked by Petitioner are not final and appealable orders, nor was the procedural step of mandamus available to Petitioner. Accordingly, neither order is a final judgment or decree which is ripe for consideration by this Court. Finally, the Texas state court enforced the applicable arbitration clause in the agreement between the South Texas Project participants precisely in accordance with its terms. Under the law and the public policy of the United States, the state court was not only correct but was required to do so, and ac-

cordingly the issue of a denial of due process is not even raised herein.

ARGUMENT

I. This Court Lacks Jurisdiction of the Petition

A. HL&P'S Petition is Untimely

28 U.S.C. § 1257(a)[1] provides for certiorari review under stipulated circumstances of "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 2101(c) provides that a petition for certiorari must be filed within ninety (90) days of the date of the judgment complained of. The introductory paragraph of HL&P's Petition and its jurisdictional argument recognize that the orders in issue were entered by the District Court of Dallas County on August 22, 1990, and April 22, 1991. HL&P maintains that its efforts at seeking a writ of mandamus tolled the deadline for filing of its Petition. The orders in issue were not subject to mandamus review by higher Texas courts, however, and HL&P's Petition is therefore untimely.

Nash v. Florida Indus. Comm'n, 389 U.S. 235, 237 n.1 (1967) teaches that identifying the highest state court competent to consider a matter requires a review of state law. Accordingly, this Court must examine Texas law to determine whether mandamus review is available to attack orders compelling arbitration.

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[1] HL&P incorrectly seeks to rely on "28 U.S.C. § 1257(3)," a provision that was redesignated as § 1257(a) when Congress eliminated appellate review of state court decisions some four years ago.

Texas courts consistently hold that mandamus is not available to subvert an order compelling arbitration. An example of such authority is *McMullen v. Yates*, 697 S.W.2d 500, 502 (Tex. App.—San Antonio 1985, no writ), in which the court of appeals held that the relator was not entitled to a writ of mandamus requiring the trial court to vacate an order compelling arbitration. In deciding that the relator had an adequate remedy on appeal following entry of judgment, the court observed that an order compelling arbitration is comparable to an order granting a plea in abatement, a decision not subject to review in a mandamus proceeding. The court reasoned that:

> If we assume, while not deciding, that the court incorrectly compelled arbitration, the resulting delay is no more onerous than being forced to try a case in an inappropriate venue, or suffering an incorrect ruling on a plea to the jurisdiction, a plea in abatement, or any other interlocutory order that is *not subject to correction by mandamus*.

Id. (emphasis added) (footnote omitted).

The San Antonio Court of Appeals affirmed and explained the McMullen decision in *Shearson Lehman Hutton, Inc. v. McKay*, 763 S.W. 934, 938-39 (Tex. App.—San Antonio 1989, no writ), holding that while appellate courts have mandamus jurisdiction to correct a decision denying a motion to compel arbitration, there is no jurisdiction to review a decision compelling arbitration. *Id.* at 939. The court explained that the difference in the availability of mandamus review was dictated by the public policies favoring arbitration: "Once forced to trial, the benefits of ar-

bitration are forever lost: the speed and economy of first going to arbitration are defeated. This benefit cannot be regained on remand." *Id.* The court reasoned that mandamus was not appropriate when the interlocutory decision is one compelling arbitration "because relator has an appeal available once a final judgment is entered and he loses no contract rights or benefits by availing himself of arbitration." *Id.*

As described in the Statement of the Case section of this Response, HL&P's Motion for Appropriate Relief argued the same issues previously addressed to the district court in HL&P's responses to the Motion of San Antonio and CPL to Compel Arbitration, and the effect of the order overruling HL&P's Motion was identical to that of the order granting the Motion of San Antonio and CPL. As such, the latter order was no more subject to mandamus review than the former, and HL&P's Petition is out of time as to both.

HL&P sought to avoid the problem it recognized as to the timeliness of its Petition by contending that its efforts to seek mandamus relief tolled the deadline for filing. The argument presupposes, however, the availability of mandamus review which, as demonstrated above, was patently nonexistent. Surely, efforts to seek relief in tribunals where that relief is legally unavailable does not excuse late filings with this Court. The highest court that could render the orders complained of was the district court which entered them, and HL&P's Petition is therefore tardy by many months.

B. HL&P'S Petition Seeks Review of an Order That is Not a Final Judgment

Of course, this Court may only entertain final judgments or decrees on certiorari. As Professor Wright

states, "[t]he most elementary component of the final judgment rule is that there must be a judgment." 16 Charles A. Wright *et al., Federal Practice and Procedure* § 4009 (1977). Both the Federal Arbitration Act, 9 U.S.C. § 9 and the Texas General Arbitration Act, art. 238-1 (Respondent's App. 7a), contemplate that following the arbitration panel's decision, a judgment will be entered. Accordingly, there is presently no final judgment for this Court to review.

The Fifth Circuit Court of Appeals relied on identical reasoning in holding that an order staying proceedings pending arbitration is not final for purposes of review under 28 U.S.C. § 1291.[2] *Jolley v. Paine Webber Jackson & Curtis, Inc.*, 864 F.2d 402 (5th Cir. 1989). The court began by quoting the classic Supreme Court holding that a decision is only final when it "ends the litigation on the merits and leaves nothing for the court to do but execute judgment." 864 F.2d at 405, *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945). The *Jolley* court next cited *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133 (1988) for the proposition that neither orders granting nor orders denying a stay pending arbitration are final, because neither ends the litigation on the merits. "While an order granting a stay postpones actual litigation in the district court, it contemplates that the district court will retain jurisdiction to confirm, modify, or, in some cases, to renew the litigation

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[2] The requirements for finality of § 1291 and § 1297 are essentially coextensive as evidenced by the Supreme Court's treatment of authority from actions involving one statute as controlling in cases involving the other. *E.g., American Export Lines v. Alvez*, 446 U.S. 274 (1980), *overruled on other grounds by Miles v. Apex Marine Corp.*, 111 S. Ct. 317 (1990).

despite the arbitration award." 864 F.2d at 405. Because of the requirement for additional court action, the *Jolley* court held that an order compelling arbitration is not final.

Gulfstream and *Jolley* have been modified somewhat by the enactment of 9 U.S.C. § 16, part of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, but only as the cases relate to the review of orders denying arbitration. The statute permits review of such orders but, consistent with previous case law, prohibits appellate consideration of orders which stay court proceedings pending arbitration or compelling arbitration. The statute is significant, first because it recognizes that orders compelling arbitration are interlocutory (and thus not dispositive of litigation) and second because it indicates a Congressional policy against review of orders compelling arbitration, *Turboff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 867 F.2d 1518, 1520 (5th Cir. 1989), a policy that would be violated were this Court to entertain HL&P's Petition.

Section 16 of the Federal Arbitration Act may apply to Texas appellate courts. In *A. G. Edwards & Sons, Inc. v. Clark*, 558 So.2d 358, 360-61 (Ala. 1990), the Alabama Supreme Court held that the statute (then designated § 15) delimited its power to consider an order concerning arbitration. This position is consistent with the holding of *Southland Corp. v. Keating*, 465 U.S. 1, 11-13 (1984), that the Federal Arbitration Act creates a body of federal substantive law regarding the enforcement of arbitration agreements involving interstate commerce, regardless of the forum in which enforcement is sought. The Fed-

eral Arbitration Act therefore provides an independent basis for the conclusion that the orders complained of are not final.

Wholly apart from federal case law and the Federal Arbitration Act, Texas doctrine prohibits appellate review of orders compelling arbitration because such orders are neither final nor subject to interlocutory review. For example, in *Citizens Nat'l Bank v. Callaway,* 597 S.W.2d 465, 466 (Tex. Civ. App.—Beaumont 1980, writ ref'd), the court squarely held that an order compelling arbitration is not a final judgment subject to appellate review. The court began by noting that in order for a judgment to be final, it "must dispose of all the issues and parties in a case." *Id., citing North East Indep. School Dist. v. Aldridge,* 400 S.W.2d 893, 895 (Tex. 1966). Observing that an order compelling arbitration of a dispute does not finally dispose of the matter, the court dismissed the appeal for lack of jurisdiction.

Similarly, in *Bethke v. Polyco, Inc.,* 730 S.W.2d 431 (Tex. App.—Dallas 1987, no writ), the court of appeals recognized that the trial court's order compelling arbitration represented simply "the first step in the ultimate disposition of the dispute between the parties." *Id.* Because the order was therefore not final, the court of appeals refused to exercise jurisdiction.

It is so clear that orders compelling arbitration are not appealable in Texas that the issue is generally conceded. For instance, in *McMullen v. Yates, supra,* the parties acknowledged that the trial court's order was not a final judgment. 697 S.W.2d at 501.

Article 238-2 of the Texas General Arbitration Act (Respondent's App. 7a) also recognizes that appellate

review of orders compelling arbitration is not available. Like its federal counterpart, the statute permits appeals of orders refusing to compel arbitration. On the other hand, Article 238-2 does not authorize appeals of orders compelling arbitration. It is logical to conclude then that the Texas Legislature agrees with all of the courts of Texas that orders compelling arbitration are not final judgments.

In conclusion, the Federal Arbitration Act, the Texas General Arbitration Act and the Texas and Federal case law all recognize that the orders attacked by HL&P are not final judgments or decrees. Obviously, this Court therefore has no jurisdiction to address the issues raised by HL&P's Petition at this time.

II. Where a State Court Enforces an Arbitration Agreement Precisely in Accordance with its Terms, There is no Denial of Due Process

The court's order compelling arbitration specified that the arbitrators should be selected in accordance with the terms of the Participation Agreement. The order accorded with the mandates of Article 226 of the Texas General Arbitration Act and § 5 of the Federal Arbitration Act to the effect that agreed-upon methods of arbitrator selection "shall be followed," and did not deny due process to HL&P.

Initially, it is clear that the court's enforcement of the negotiated procedure will produce a fair and balanced panel, as once recognized by HL&P. At the same time, the panel would not be rendered defective even if a majority of the arbitrators were to be selected by parties adverse to HL&P. HL&P's argument to the contrary is based on cases involving

tripartite arbitration and wholly disregards the possibility that a party-appointed arbitrator can operate as a neutral. Indeed, one of the authorities relied upon by HL&P recognizes that a party-appointed arbitrator may act as a neutral. *Code of Ethics for Arbitrators in Commercial Disputes,* Canon VII (Respondent's App. 8a).

Given that HL&P cannot sustain the argument that party-appointed arbitrators are necessarily partisan, it resorts to the position that the "appearance of bias" requires reconfiguration of the panel, basing its argument on what it terms the holding of *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968) (Black, J., plurality opinion). It is true that in that case, Justice Black, writing for a plurality of four justices, appeared to impose on arbitrators the same lofty ethical standards applicable to Article III judges. At the same time, four justices do not constitute a majority of the Supreme Court. Several cases in which the court has been cited to the language in Black's opinion have held that arbitrators are not subject to disqualification due to an appearance of bias, and the Supreme Court has declined at least two opportunities to correct the opinions. *See, e.g., Pitta v. Hotel Ass'n of New York City, Inc.,* 806 F.2d 419, 423 (2d Cir. 1986); *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 173-74 (2d Cir. 1984); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters,* 748 F.2d 79, 83 (2d Cir. 1984); *Merit Ins. Co. v. Leatherby Ins. Co.,* 714 F.2d 673, 679 (7th Cir.), *cert. denied,* 464 U.S. 1009 (1983); *International Produce, Inc. v. A/S Rosshavet,* 638 F.2d 548, 551-52 (2d Cir.), *cert. denied,* 451 U.S. 1017 (1981). These cases all hold that an individual is not disqualified from

serving as an arbitrator unless he demonstrates "evident partiality," a standard described in § 9 of the Federal Arbitration Act. As described in *Morelite*, "evident partiality" is a considerably lower standard than that by which Article III judges are evaluated, and an arbitrator is only disqualified "where a reasonable person would *have to* conclude that an arbitrator was partial to one party to the arbitration." 748 F.2d at 84 (emphasis added).

HL&P's consent to the arrangement it now attacks is a matter of dispositive significance. As this Court recognized in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848-9 (1986), the right to Article III's guarantee of an independent and impartial adjudication is "subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried." Notably, assent to private arbitration operates as just such a waiver. *Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 316-318 (7th Cir. 1987), *cert. denied*, 488 U.S. 816 (1988). *FDIC v. Air Florida Sys., Inc.*, 822 F.2d 833, 842 n.9 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988), and *Elmore v. Chicago & I.M. Ry.*, 782 F.2d 94, 96 (7th Cir. 1986), are consistent with *Geldermann*, recognizing that private arbitration does not implicate due process considerations.

The foregoing authorities indicate the importance of judicial deference to the agreement of the parties. As established by other cases, parties to an arbitration agreement will not be heard to attack the terms of their own agreement. "Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication." *Moseley*,

Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 268 (7th Cir. 1988), *citing Stroh Container Co. v. Delphi Indus., Inc.,* 783 F.2d 743, 751 n.12 (8th Cir.), *cert. denied,* 476 U.S. 1141 (1986). Likewise, "[t]he parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen." *Merit Ins. Co.,* 714 F.2d at 679.

The foregoing cases describe important principles which preclude this Court from intervening to rewrite the parties' agreement. Private arbitration does not include due process protections, and the panel's composition is in any event a fair one. Under the circumstances, there is no basis for this tribunal to assume the task of configuring a panel which will be more agreeable to HL&P than the one the parties mutually agreed upon years ago.

CONCLUSION

The United States Supreme Court does not have jurisdiction of a Petition for Writ of Certiorari to challenge state court orders which are not final and not appealable, and which were entered more than nine months prior to the filing of the Petition. Furthermore, there is no denial of due process where a state court compels arbitration of a dispute in precise accordance with the arbitration agreement of the parties, and with a majority of the panel controlled by neutral arbitrators. Consequently, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 28, 1992

Supreme Court, U.S.
FILED
MAR 20 1992
OFFICE OF THE CLERK

(4)

No. 91-1230

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

HOUSTON LIGHTING AND POWER COMPANY,
Petitioner,

v.

THE HONORABLE JOSEPH B. MORRIS, JUDGE
(CITY OF SAN ANTONIO AND CENTRAL POWER
AND LIGHT COMPANY, REAL PARTIES IN INTEREST),
Respondents.

PETITIONER'S REPLY BRIEF

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March 20, 1992

LIST OF PARTIES

HOUSTON LIGHTING & POWER COMPANY

Petitioner,

CITY OF SAN ANTONIO, TEXAS,
ACTING BY AND THROUGH
CITY PUBLIC SERVICE BOARD OF SAN ANTONIO,

CENTRAL POWER AND LIGHT COMPANY,

CITY OF AUSTIN, TEXAS[1]

HONORABLE JOSEPH B. MORRIS,
Judge of the 101st Judicial District Court of
Dallas County, Texas[2]

Respondents.

RULE 29.1 STATEMENT

Houston Lighting & Power Company ("HL&P") is a wholly owned subsidiary of Houston Industries, Inc., which is a publicly held company. Central Power and Light Company ("CPL") is a wholly owned subsidiary of Central and Southwest Corporation, which is a publicly held company.

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[1] The City of Austin was not a party to the state district court proceedings but, at Austin's request, was named as a party in interest when HL&P sought review by mandamus in the Texas appellate courts.

[2] As presiding judge of the 101st Judicial District Court of Dallas County, Judge Morris made the rulings which are the subject of this Petition. Under Texas mandamus procedure, he was named as a formal respondent in the ensuing mandamus proceedings in the Texas appellate courts, but has no interest in the subject matter.

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AND LIGHT COMPANY, REAL PARTIES IN INTEREST),
Respondents.

PETITIONER'S REPLY BRIEF

I. This Court Has Jurisdiction

The principal theme of the Briefs in Opposition is Respondent's claim that because issues of arbitrability can be reviewed on appeal from the arbitrators' award, the Texas appellate courts wisely refused to interfere with the trial court's order, and this Court should do the same. This argument, however, does not reach HL&P's complaint that it is being subjected to arbitration before a structurally biased panel — controlled four-to-one by arbitrators chosen by HL&P's opponents — which fails to meet minimal constitutional requirements of impartiality. Review after an award by a biased panel is not adequate because embedded bias may produce an award unassailable under the statutory standards of review.

The structural flaws in the proposed five-member panel of arbitrators, at least three of whom are appointed by the claimants against HL&P, raise questions of due process, not mere matters

of contract interpretation. This court has jurisdiction under 28 U.S.C. §1257(a) to review the failure of the Texas courts to vindicate HL&P's constitutional right to arbitration before an impartial panel.

HL&P's request that the arbitration panel be restructured *before* arbitration to ensure fairness invoked the unquestioned equitable powers of the trial court to do so, as well as plenary authority granted to it under the Texas General Arbitration Act (the "Texas Act"), article 235(G). When the trial court refused to act, HL&P exhausted any available remedy by mandamus in the Texas appellate courts.[3] Although further state proceedings will occur on judicial review of any arbitration award, the highest court of the State of Texas has finally determined against HL&P the particular constitutional issue here. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480-81 (1975), holding that the "final-judgment rule" includes cases where "further proceedings on the merits in the state courts [are] to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." HL&P's contentions can be properly addressed only now, *before* the arbitration occurs. After arbitration, bias may be buried in an award subjected to only limited review.

II. Appeal of an Award Is Not an Adequate Remedy for a Structurally Biased Panel

HL&P asserts a right not to be forced to undergo arbitration before a panel that lacks the "elementary requirements of impartiality," *Commonwealth Coatings v. Continental Casualty Co.*,

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[3] Mandamus is available under Texas law to correct fundamental errors at the outset when later appeal is insufficient to protect a litigant's rights. *State v. Thomas*, 766 S.W.2d 217 (Tex. 1989); *State v. Walker*, 679 S.W.2d 484 (Tex. 1984); *General Motors Corp. v. Lawrence*, 651 S.W.2d 732 (Tex. 1983); *Crane v. Tunks*, 328 S.W.2d 434 (Tex. 1959).

393 U.S. 145, 149 (1968). After the arbitral award is made, HL&P's constitutional assertion that it cannot be required to submit to arbitration before a biased panel will be moot. It will then be relegated to an appeal from the arbitration award as the forum to assert its claim that "private dispute settlement arrangements" must "operate within some minimum levels of integrity" before they may be enforced through the courts. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976).

However appeal is not an effective remedy when the panel is weighted against HL&P by a majority of arbitrators appointed by the claimants against it. The limited grounds for appeal under the Federal or the Texas Arbitration Acts require a showing of "evident partiality," "corruption," prejudicial misconduct or "willful misbehavior." Each of these grounds focuses on the conduct of *individual* arbitrators and fails to address the fact that bias may result from the way that a panel is composed. Although party-appointees are not held *individually* to the same standards that neutral arbitrators are (see HL&P's Petition at 12–13), if the majority of panel members are appointed by the claimants against HL&P, the arbitration panel itself lacks the requisite impartiality. In such a proceeding, bias may take the surreptitious form of a massive damage award against HL&P as the natural product of an arbitration dominated by HL&P's adversaries, acting through their appointees.

Although the constitutional standards established in *Commonwealth Coatings* are recognized, there is no consensus as to the degree of proof required to show bias on appeal of an arbitral award. On one hand, the Tenth Circuit has held that "it is only clear evidence of impropriety which justifies the denial of summary confirmation of an arbitration award." *Ormsbee Development Co. v. Grace*, 668 F.2d 1140 (10th Cir. 1982), *cert. denied*, 459 U.S. 838 (1982). On the other, the Seventh Circuit has held that the "appearance of bias" standard "just means that it is

unnecessary to demonstrate — what is almost impossible to demonstrate — that the arbitrator had an actual bias." *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673 (7th Cir. 1983), *cert. denied*, 464 U.S. 1009 (1983). Between these two extremes the Second Circuit has held that the "mere appearance of bias that might disqualify a judge will not disqualify an arbitrator," but stated in the same case:

> the relationship between a party and the arbitrator may, in some circumstances, create a risk of unfairness so inconsistent with basic principles of justice that the arbitration award must automatically be vacated.

Pitta v. Hotel Association of New York City, Inc., 806 F.2d 419, 423-24 (2nd Cir. 1986). Taking still a different approach, the U.S. Court of Claims has held that

> Since it is impermissible for the court to probe the decisional and thought processes of the [arbitral] Board and its members . . . care must be taken to avoid any situations that possess a significant danger of improper influence. Indeed, even where there is not claim of actual bias, a tribunal may be disqualified merely because of the appearance of bias.

Baltimore Contractors, Inc. v. The United States, 643 F.2d 729 (Ct. Cl. 1981) (citations omitted). The Ninth Circuit requires "more than a mere appearance of bias to disqualify an arbitrator," *Employers Insurance of Wausau v. National Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481 (9th Cir. 1991); the Eleventh Circuit requires only that the "possibility of bias be direct, definite, and capable of demonstration." *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470 (11th Cir. 1988), *cert. denied*, 489 U.S. 1018 (1988). Because HL&P's burden of proof on appeal is unsettled and ill-defined, review by a court on an appeal from the arbitrators' award cannot guarantee its right to due process.

The Texas Act presents a similar problem, as it offers HL&P no means to appeal an award from a panel that is *structurally* biased but displays no overt partiality. HL&P cannot, for exam-

ple, seek reversal of a decision by the arbitrators that goes against the great weight and preponderance of the evidence, nor can it obtain trial *de novo*. The mere possibility of review or the prospect that bias may be later corrected on appeal does not make an unfair proceeding constitutionally acceptable. *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972); *Tumey v. Ohio*, 273 U.S. 510, 533 (1926). Due process requires "a neutral and detached judge in the first instance." *Ward* at 62.

III. Unless the Structural Bias of the Panel Is Corrected Before Arbitration, HL&P's Claims Will Evade Review

Unless the structural bias of the panel is corrected before arbitration, HL&P will have no effective forum for assertion of its claim. Like complaints of short-lived orders, HL&P's assertions of a right to due process would evade review and, in a real sense, become moot. In *Southern Pacific Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911), the Court created an exception to the mootness principle for controversies "capable of repetition, yet evading review," based on the Court's recognition that rote application of its prudential rules would sometimes leave claimants "without a chance of redress."

HL&P faces a similar procedural anomaly in an important area of national policy. The efforts of Congress and the courts to promote fair arbitration as an alternative to litigation are no less important than issues of residency requirements for divorce or for voting, *Sosna v. Iowa*, 419 U.S. 393 (1975), *Dunn v. Blumstein*, 405 U.S. 330 (1972); credit card usury, *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980); welfare benefits for striking workers, *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); or the right of a woman to terminate her pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973). The significance of the issues presented in each of these cases led the Court to avoid the mootness of particular controversies by providing appropriate relief when review after the fact would have been ineffective.

The "capable of repetition, yet evading review" exception also acknowledges "the unique and valuable ability of this Court to decide a case — we are, at present, the only Art. III court which can decide a federal question in such a way as to bind all other courts." *Honig v. Doe*, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring). Given the current prominence of alternative dispute resolution and the proliferation of multi-party contracts, it is particularly important that this Court reaffirm the principle that the due process standards applicable to judicial proceedings are not suspended when arbitration is used as a substitute for litigation. When literal application of an arbitration clause results in an unconstitutional hearing process, the purpose of arbitration is lost; the forest disappears behind the trees. HL&P asks this Court to set aside the orders of the Texas courts which deny it an impartial tribunal to arbitrate the claims against it.

IV. Neutrality Oaths Are Insufficient to Guarantee Due Process

San Antonio concedes that an impartial panel is essential to due process, but declares flatly that this panel — composed of a majority of arbitrators appointed by claimants against HL&P — *is* fair. But numerous courts have acknowledged that neutrality cannot be created by declaration (see authorities cited in HL&P's Petition at 14-15), a fact also reflected in the rules of the American Arbitration Association and the Texas Act (see Appendix G and Appendix J to HL&P's Petition).

The common law has long recognized that the taking of an oath does not guarantee impartiality, otherwise there would be no basis to review challenges to jurors for cause. Chief Justice John Marshall wrote at length about this healthy skepticism in *United States v. Burr*, 25 F. Cas. 49 (C.C.D. Va. 1807) (No. 14,692g):

> The great value of the trial by jury certainly consists in its fairness and impartiality . . . . [T]o secure this end, a man is prohibited from serving on it whose *connection with a party is*

> *such as to induce a suspicion of partiality*. The relationship may be remote; the person may never have seen the party; *he may declare that he feels no prejudice in the case*; and *yet the law cautiously incapacitates him* from serving on the jury because it suspects prejudice, *because in general persons in a similar situation would feel prejudice* . . . . Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason.

Id. at 50 (emphasis added).

Thus although a prospective decision maker may be "sincere when he said that he would be fair and impartial to petitioner . . . the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin v. Dowd*, 366 U.S. 717, 728 (1961). There are sound reasons for the categorical limitation of party-appointees to a minority on an arbitration panel:

> [I]n the run of instances that are likely to generate bias, consciously or unconsciously, it would be a hopeless endeavor to search out the impact of these circumstances on the mind and judgment of a particular individual. Law as a response to life recognizes the operation of such influences even though not consciously or clearly entertained. *The appearance of impartiality is an essential manifestation of its reality*.

Dennis v. United States, 339 U.S. 162, 181-2 (1950) (Frankfurter, J., dissenting) (emphasis added). *Commonwealth Coatings* reached the same conclusion, reasoning that even though an arbitrator was not "actually guilty of fraud or bias in deciding [a] case," and even though there was no reason "to suspect him of improper motives," the Court

> should, if anything be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free reign to decide the law as well as the facts and are not subject to appellate review.

Id. at 149.

CONCLUSION

The Court has jurisdiction in this case. HL&P is seeking review of actions of the Texas courts which require it to submit to arbitration before a partial and imbalanced forum in violation of its right to due process. If the arbitration proceeds before the panel as it is currently structured, HL&P's right cannot later be effectively asserted on appeal from an award. The distinction between truly neutral arbitrators and party appointees is well established and, under the standards articulated in *Commonwealth Coatings*, should lead the Court to grant HL&P's Petition and reaffirm the application of due process principles to arbitration.

Respectfully submitted,

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